No. 84-861

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC. AND TIDEWATER MOTOR TRUCK ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board correctly concluded that the collectively bargained rules governing the use of containers in the shipping industry, in their application to certain widespread practices of motor carriers and warehouses, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act, 29 U.S.C. §§158(b)(4)(B) and 158(e).

PARTIES TO THE PROCEEDING

The proceeding in the court whose judgment is sought to be reviewed encompassed four consolidated cases seeking review or enforcement of decisions of the National Labor Relations Board. In addition to the National Labor Relations Board, the following parties appeared in one or more of the four consolidated cases: American Trucking Associations, Inc.;[1] Tidewater Motor Truck Association;[2] American Warehousemen's Association; International Association of NVOCCs; Houff Transfer, Inc.; International Brotherhood of Teamsters; International Longshoremen's Association, AFL-CIO; ILA Hampton Roads District Council; ILA Atlantic Coast District Council; ILA District Council, Baltimore, Maryland; ILA Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; New York Shipping Association; Council of North Atlantic Shipping Associations; Hampton Roads Shipping Association; Southeast Florida Employers Port Association; Coordinated Caribbean Transport, Inc.; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company; Marine Terminals, Inc.; Florida Custom Brokers and Forwarders Association, Inc.; Twin Express, Inc.; National Container Express, Inc.; and San Juan Freight Forwarders, Inc.

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1. ATA, a non-profit District of Columbia corporation, is a national federation of 51 independent and autonomous "state trucking associations," each representing all classes and types of trucking operations. Full membership in ATA is obtained by companies and individuals through affiliation with the state associations. Virtually every major trucking company in the United States is an affiliate of ATA.

2. TMTA is an unincorporated association consisting of seventeen member companies, most of whom are affiliated with ATA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[3] is reported at 734 F.2d 966. The decision and order of the National Labor Relations Board (Pet. App. 35a-64a) and the decision of the Administrative Law Judge (Pet. App. 65a-258a) are reported at 266 NLRB 230.

3. "Pet. App." refers to the appendix filed jointly by the petitioners in Nos. 84-677, 84-684, 84-691, and 84-696. "Jt. App." refers to the appendix filed in No. 84-861. "C.A. App." refers to the appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1984. Pet. App. 1a-30a. A petition for rehearing was denied on July 31, 1984. Pet. App. 31a-34a. The petition for a writ of certiorari was timely filed on November 28, 1984, and was granted on January 21, 1985. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(b) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
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> * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is:
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> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

Section 8(e) of the Act, 29 U.S.C. §158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . .

STATEMENT OF THE CASE

A. The Rules on Containers

This case concerns the legality of the Rules on Containers ("Rules") negotiated by the International Longshoremen's Association ("ILA") and various ocean vessel operating common carriers ("VOCCs" or "steamship lines") and their associations. The Rules are a response to a technological change in the freight transportation industry customarily referred to as "containerization." A large, reusable metal container that can be moved on and off an ocean vessel unopened and transferred between different transportation modes is the primary hardware of the new technology.[4] Jt. App. 190.

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4. Containers range in length from 20 to 40 feet and are capable of holding upwards of 30,000 pounds of freight. They

(Continued on following page)

Four distinct segments of the freight transportation industry handle containers. Each serves a different basic transportation function. VOCCs use containers in connection with ships to unitize cargo for loading, transport and unloading. VOCCs employ ILA represented labor to perform this work.[5] Consolidators, including NVOCCs, use containers to combine the goods of various shippers into a single shipment at their own off-pier terminals and deliver the container to the pier.[6] *ILA I*, 447 U.S. at 496 n.8.

Footnote continued—

can be placed on truck chassis or on railroad flatbed cars and transported unopened to and from the ocean pier, and they fit into the holds of specially designed vessels known as containerships. *NLRB v. International Longshoremen's Assn.* (*"ILA I"*), 447 U.S. 490, 494 (1980).

5. ATA argued unsuccessfully to the Administrative Law Judge ("ALJ") and the Board that the Rules had a secondary objective because they were negotiated between VOCCs and the ILA as representative of the bargaining unit of "longshoremen," who load and unload cargo to and from the ships, but are for the primary purpose of preserving work for "short-shoremen," employed by terminal and stevedoring companies and represented by the ILA in separate bargaining units, at least in the Port of Hampton Roads, Virginia. ATA Brief to the Bd. at 15-17, 50-54. It is the short-shoremen who segregate, mark, unitize, and otherwise handle the cargo in the terminal areas, load and unload the cargo to and from the containers, and move the containers to and from the locus of the ship's tackle where the containers are then handled by the longshoremen employed by stevedoring companies to load and unload ships. Only longshoremen are covered by the Rules on Containers agreement. Only by blurring the separate employment relationships of maritime employers and the work traditions of their work forces was the ALJ able to ignore the clear secondary objective of the Rules to protect the work in sister ILA locals not covered by the Rules. Pet. App. 106a n.29. Therefore, all maritime employees represented by the ILA will be referred to hereinafter as "longshoremen."

6. Consolidators may or may not own and operate their own motor trucks. Some contract with motor carriers for the actual transportation of the goods. A consolidator who acts as a carrier by arranging and being responsible by a single bill of lading for the transportation of goods from shipper to consignee or from an inland warehouse across the sea to an inland destination location is called a non-vessel operating common carrier by water ("NVOCC"). *ILA I*, 447 U.S. at 496 n.8.

Motor carriers use containers on truck chassis to transport containers filled with export cargo from shippers to the pier and to transport containers filled with import cargo from the pier to consignees. *ILA I*, 447 U.S. at 500-501. Warehouses unload import cargo from containers for storage and containerize for export previously stored cargo.[7] Consolidators, motor carriers and warehouses employ labor represented by the Teamster's Union and unrepresented labor to handle containers. Jt. App. 6, 15-16, 49, 63, 89-90, 127.

The loading of containers, by whomever performed, is known as "stuffing"; the unloading of containers is known as "stripping." *ILA I*, 447 U.S. at 497; Pet. App. 84a. A container that contains export cargo belonging to more than one shipper or import cargo destined for more than one consignee is termed a "consolidated load," or a "less-than-container load" ("LCL") container. A container that contains export cargo from only one shipper or import cargo destined for only one consignee is known as a "full shippers load" ("FSL") container. *ILA I*, 447 U.S. at 497.

The growth of containerization reduced the traditional loading and unloading work performed by both longshoremen and truckers at the seaport terminal. Containers eliminated the need for piece-by-piece (or "break-bulk") cargo handling between the ship and the truck. *ILA I*, 447 U.S. at 495-496; Pet. App. 46a. Export containers were stuffed before they reached the pier; import containers were stripped after they left the pier. With respect to containerized cargo, it remained only for longshoremen to take

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7. Containers are also used by the actual or "beneficial" owners of goods to send goods from or receive goods at their place of business. Beneficial owners may contract with VOCCs, consolidators, motor carriers and/or warehousemen for services in connection with the transportation of import or export containers.

the containers on and off the vessel, and for truckers to drive away with the containers. Pet. App. 46a-47a; Jt. App. 154; C.A. App. 602, 635-36, 640-42, 677.

Seeking to replace the work lost by ILA members because of containerization, the ILA and the Council of North Atlantic Shipping Associations ("CONASA"), an organization of shipping associations whose members are steamship lines and stevedoring companies operating out of North Atlantic ports, the New York Shipping Association (an association of VOCCs operating out of the Port of New York), and other Respondent maritime associations and employers have negotiated a series of collective bargaining agreements incorporating the Rules. These agreements have been adopted by the ILA and multi-employer associations in every major Atlantic and Gulf Port. Pet. App. 47a, 96a-97a & n.23; Jt. App. 200; C.A. App. 1157, 1189.

The Rules require that, with one relevant exception, all containers, whether LCL or FSL, which would otherwise be stuffed or stripped within 50 miles of a port by employees other than those of the beneficial owner of the cargo, must be stuffed or stripped by ILA-represented longshoremen at the seaport terminals. The exception is for FSL import containers where the cargo is to be warehoused at a bona fide warehouse for a minimum of 30 days. Pet. App. 103a, 232a-233a.

The Rules forbid the signatory employers from supplying containers to any person or business entity operating in violation of the Rules. The Rules also require any VOCC, which fails to comply with the Rules and releases for handling a container that should have been stuffed or stripped on the pier by longshoremen, to pay liquidated damages of $1,000 per container into the container royalty fund. Pet. App. 11a, 47a, 103a, 228a-229a. The ILA has repeatedly attempted to enforce the Rules through pen-

alties, threats and inducements. Pet. App. 179a-182a. To protect themselves from ILA fines the steamship lines have refused to permit the release of empty or full containers to motor carriers, consolidators, and warehouses when it is believed that they would be stuffed or stripped in violation of the Rules.

B. ILA I

In *ILA I*, this Court remanded a Board holding that the Rules unlawfully sought work always performed off-pier, because the Board had improperly relied upon the lack of ILA off-pier work traditions. *ILA I*, 447 U.S. at 506-08. The Court directed the Board to "evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members." *Id.* at 509. The Court explained that the legality of the Rules turned, as an initial matter, "on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." *Id.* at 510. The Court noted that "the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *Id.* at 510 n.24.

The Court recognized that in the instant case, technological innovation had "changed the method of doing the work, instead of merely shifting the same work to a different location." *Id.* at 505. Where the method of doing the work has changed, the Court cautioned that a union is entitled to preserve only its "*traditional work patterns.*" *Id.* at 506 (emphasis added).

The Court declined to apply this "historical and functional relationship" test in the first instance to the facts before it, on the ground that the Board had not "had an opportunity to consider these questions in relation to a proper understanding of the work at issue." *Id.* at 511. Rather, the Court directed the Board to determine whether the "stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier," or whether, "containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshoremen and employees of motor carriers has been completely eliminated." *Id.* at 510-11.

This Court disclaimed in *ILA I* any intention to either "decide today the proper definition of the work in controversy . . . [or] hold that the Rules are a lawful work preservation agreement." *Id.* at 511 n.26. Rather, the Court emphasized that "the question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand." *Id.*

C. Findings of the Administrative Law Judge

On remand, the Board consolidated the two cases reviewed in *ILA I* with seven other proceedings concerning the Rules. Prior evidentiary records were significantly supplemented.

Upon consideration of the evidence in light of the mandate of this Court, the ALJ rejected ATA's contention that containerization has worked such fundamental changes in the freight transportation process that container work dictated by customers to be performed away from the piers was not functionally related to traditional

ILA work. Pet. App. 114a-123a.[8] The ALJ found the Rules had a general work preservation objective, and that all of the container work performed by NVOCCs and other pure consolidators, as well as some of the container work of motor carriers and warehousemen, could be preserved by the Rules for the benefit of the longshoremen.

Although the ALJ did not find that containerization had so fundamentally changed the transportation industry that all of the new work was functionally unrelated to traditional ILA work, he did find that certain motor carrier and specialty warehouse container work was functionally unrelated to traditional ILA work, and therefore, was beyond the lawful reach of the Rules. The ALJ turned his decision on the presence or absence of a functional relationship between traditional ILA work and the various categories of work sought by the Rules.

1. Findings as to consolidators

The ALJ found that the Rules were lawful as applied to consolidators, including NVOCCs, because they are almost exclusively engaged in the handling of LCL cargo on behalf of small shippers. Pet. App. 125a. The ALJ found that this work served the same function in the course of ocean transportation of cargo as the work historically performed by ILA members. Pet. App. 123a-129a. The ALJ stated that "the NVOCCs and steamship companies are competitors, and the NVOCCs' stuffing and stripping of containers owned or leased by the former is pursuant to a reallocation of work from the piers to offshore facilities created virtually in its entirety by the development of containerization." Pet. App. 129a. The propriety of this find-

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8. This issue has been presented for review by ATA's Petition for Certiorari, Case No. 84-696, still pending before the Court.

ing apparently is not within the scope of the Court's grant of certiorari herein.[9]

2. Findings as to motor carriers

The ALJ found that the Rules could *not* lawfully be applied to certain practices of motor carriers, because these practices were neither historically nor functionally related to the traditional work of ILA members.

As regards the motor carriers' handling of import cargo, the ALJ found that prior to containerization motor carriers picked up break-bulk cargo at a seaport terminal and delivered the cargo to the motor carrier's freight station where it was unloaded and then reloaded into over-the-road equipment for delivery to one or more consignees. The ALJ further found that this practice of off-loading, sorting, segregating and reloading by destination was "a practice which possessed no exclusive relationship to marine trade," noting that "cargo shipped purely on an interstate or continental basis by motor truck . . . is subject to the same handling at terminals and truck stations." Pet. App. 132a-133a.

After containerization, motor carriers began to pick up containers from the pier and reload the containers at the motor carriers' freight stations into over-the-road equipment, a practice known as "short-stopping."[10] The ALJ

9. ATA concedes, but only for the purposes of considering the issue herein, that the ALJ appropriately awarded some of the work sought by the Rules to longshoremen. ATA's Petition for Certiorari is still pending as to this work. Case No. 84-696.

10. The ALJ used the term "short-stopping" to denote only the stripping and restuffing of *import* containers. Pet. App. 133a-135a. In *ILA I*, the Court used the term "short-stopping" to denote the stripping and restuffing of either import or export containers. *ILA I*, 447 U.S. at 501. This brief uses the term in its latter, broader definition.

found that the short-stopping of import containers by motor carriers was simply a continuation of traditional motor carrier work which bore no historical or functional relationship to the traditional work of ILA members:

> [I]t appears that the practice of short-stopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience. To the extent that containers are handled *for such purposes*, and not under direction or for the benefit of shippers, consignees or their agents, *short-stopping has no relevance to the marine leg of the intermodal network*. Although skills utilized therein are indistinct from those of deepsea longshoremen in the performance of their traditional duties, *it is work assumed for a different purpose, and in a different segment of the transportation industry*. Short-stopping is simply a carrier oriented, as distinguished from consumer oriented service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, upon delivery of a container to a motor carrier, the seaborne leg ends, the *container becomes the substitute for the trailer or van*, and work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deepsea ILA labor by marine operators.

Pet. App. 134a-135a (footnote omitted) (emphasis added).[11]

11. The ALJ held that motor carriers could short-stop both FSL and LCL containers for their own benefit and convenience, but the Rules could be enforced to prevent motor carriers from consolidating and deconsolidating LCL containers for the benefit of customers, because that would "encourage a diversion of work to combined trucking/warehouse operations, or for that matter to truck stations, to evade the legitimate reach of the Rules and to undermine traditional ILA work jurisdiction." Pet. App. 139a n.55, 137a n.54, 133a, 132a.

As regards motor carriers' handling of FSL and non-consolidated LCL export containers,[12] the ALJ found:

> [M]otor carriers also have stuffed FSL containers for export within the port area. For example, since containerization, certain interstate truckers have stuffed FSL containers at their port area truck stations. Thus, in order to avoid inconvenience attendant in the delivery of empty containers to shippers so as to enable stuffing by the customers' employees and immediate transport to the pier, such cargo will be hauled in trailer loads to the truck station, where it will be stuffed into FSL loads and delivered to the pier. Evidence also exists that at least one carrier stuffed all export FSL containers at its port area truck station because its tractors were incompatible with and were damaged by containers.... [T]*he stuffing of outbound FSL containers by entities acting purely in the capacity of motor carriers, not as a direct service to customers, but to facilitate their own transport needs, would seem incidental to the movement of surface freight.* As such, the FSL container handling would fall within the framework of traditional motor carrier practice, relative to the preparation of freight for delivery from port trucking station to the piers, as well as the conversion of cargo from over-the-road to local type equipment. If this work is not offered to the public as an available service, or performed under an ocean bill of lading, or on behalf of an NVOCC, ocean freight forwarder or anyone else engaged in services offered by employers of ILA labor, *it bears an insufficient relationship to work performed within the marine leg of the transport system, to represent work fairly claimable by deepsea ILA labor.* As is [t]rue of "short-

12. See n.10 *supra*.

> stopping", application of the Rules in this context is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns not involving work lost by longshoremen in consequence of containerization.

Pet. App. 136a-137a (footnotes omitted) (emphasis added).

3. Findings as to warehousemen

The ALJ held that the Rules could lawfully be enforced to prevent warehousemen from (a) consolidating and deconsolidating LCL containers, (b) stripping and stuffing of LCL containers not consolidated or deconsolidated by warehousemen, and (c) stripping and stuffing FSL containers when such stripping and stuffing is performed for the sole purpose of avoiding this work at the piers. Pet. App. 137a n.54, 139a n.55, 141a, 144a, 145a n.59. The ALJ reasoned that:

> Since the distinction between container handling which is and which is not rightfully claimable by ILA, insofar as warehousing is concerned, to a great extent is a function of time, the 30-day storage rule is not wholly inapposite to ILA's legitimate claim *insofar as it extends to cargo lots no part of which is received by a warehouse for indefinite holding.* In this posture, the 30-day storage rule seems a logical basis for *distinguishing the historic warehouse function from that which is merely an inland container station established to erode ILA historical work jurisdiction.*

Pet. App. 142a (emphasis added).

However, the ALJ found that the Rules' 30-day storage requirement cut too deeply into traditional warehouse

practices. Pet. App. 141a. As regards the handling by warehouses of *import* cargo, the ALJ found that prior to containerization import cargo would be delivered to the warehouse by a trucker, where the trailer or truck would then be unloaded, with the cargo sorted, segregated, palletized and placed in a designated storage area, until the consignee instructed the warehouse to distribute or deliver the goods. Pet. App. 138a. The ALJ further found that after containerization warehousing practices did not change; where previously warehouse employees stripped truck trailers, they now perform the same work upon containers. Pet. App. 138a.

Thus, the ALJ found that the Rules could not lawfully be applied to the stuffing and stripping of *FSL import* containers by warehouse employees where such work was done in connection with the traditional storage function of warehouses:

> The container handling services afforded by warehousemen as outlined above are and have been integrated into a surface system of transportation, which was not created by containerization, *and poses no threat to historic work jurisdiction of ILA.* As was true of motor carriers, the Rules on Containers as applied to such historic aspects of off pier work constitutes a work acquisition arrangement contemplating seizure of jobs on behalf of ILA to obtain traditional work of others to *compensate for their own unrelated job losses.* . . . [C]onsignees of imported goods often utilize inland warehouses to inventory imported goods, as against flexible and unforeseeable market demand. Such practices permit immediate delivery and avoid the delays encountered through a shipment from point of origin on sale, or customer order, method of doing

> business. *It is an integral part of the surface distribution system not generally, duplicated at portside marine operations, and container handling in conjunction therewith, is akin to the historic unloading of trailers at said site.* Application of the ILA's 30-day storage limitation so as to preclude a consignee's access to warehoused goods *in container-size lots* is often incompatible with the consignee's need to meet consumer demand, and enforcement of that restriction in such a context serves as an impediment to *inland work practices which bear no relationship to services customarily or historically available at pier side.*

Pet. App. 139a, 141a (emphasis added).

The ALJ held that, to the extent that warehouses stuffed or stripped *FSL export* containers without performing any specialized warehouse services, the work of the warehouses was historically and functionally related to traditional ILA work:

> Where no special services peculiar to the surface warehousing industry are provided or performed in connection with such activity, the work of stuffing the container could as easily be performed at pier side with ILA deepsea labor. The ban of the Rules on such a practice effectively restores for deepsea longshoremen the work they performed with respect to the cargo prior to containerization when shippers of large quantities of goods delivered full trailer loads directly to the piers.

Pet. App. 144a.

However, the ALJ reached a different conclusion where the handling by warehouses of *FSL export* cargo included the performance of specialized warehouse ser-

vices. Where this occurred he treated this work the same as FSL import container work. The ALJ found with respect to one example of warehouse work:

> The service provided by [a warehouseman] . . . , though involved with exports, is an incident of traditional shore-side services, conventionally available through inland warehouses, which *is not an essential preliminary maritime service.* The ILA's claim for this work by virtue of the Rules on Containers is no more in support of fairly claimable work than in the case of importation of FSL cargo for holding and distribution by a full service public warehouse located within the port area.

Pet. App. 144a n.58 (emphasis added). Similarly, the ALJ held that the stuffing of FSL containers for export by another warehouseman "was but an incident of general storage, picking, and consolidation, pursuant to an ongoing relationship between warehouse and single shipper, which together represent an integrated inland service, distinct from the temporary storage provided at marine terminal warehouses." Pet. App. 182a.

The ALJ recognized that the application of the Rules to warehouse work could not "be branded with overarching legality or illegality on a facial basis," and concluded that "the legitimacy of the Rules as they apply to warehousemen handling FSL containers must be resolved on a case-by-case basis."[13] Pet. App. 145a.

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13. The various traditional warehouse practices found by the ALJ to be beyond the lawful reach of the Rules are hereinafter referred to as "specialty warehouse work."

D. The Board's Decision and Order

The Board affirmed the rulings, findings, and conclusions of the ALJ and adopted his recommended Order. Pet. App. 42a. However, the Board modified the ALJ's rationale for concluding that the Rules were unlawful as applied to short-stopping and traditional warehousing functions in this respect:

> The Administrative Law Judge also found that no new work was created by containerization for trucking and warehousing employees. Further, in contrast to consolidation, no work was diverted away from the pier to the truckers and warehouses as a result of containerization, at least as to those short-stopping and traditional warehousing services involved where he found violations. Rather, after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking and warehousing employees, essentially was eliminated. While we agree with the Administrative Law Judge's conclusion that the ILA had an unlawful work acquisition objective in claiming this loading and unloading work which is now done solely by trucking and warehousing employees in connection with short-stopping and traditional warehousing services, we do not agree with his reliance on the fact that the work now done by the truckers and warehouses is work which was not created by containerization. Instead, we point to the fact that, because of the efficiency of the new technology, the duplicative work of the longshoremen, in handling cargo which is then rehandled by truckers and warehouses, no longer exists as a step in the cargo-handling process.

Pet. App. 59a.

E. The Decision of the Court of Appeals

The court of appeals held that "the Rules are valid in all respects." Pet. App. 4a. It accordingly sustained the Board's Order insofar as it upheld the lawfulness of the Rules, but denied enforcement of the Order insofar as it held unlawful the Rules' application to short-stopping and traditional warehousing practices.

The court of appeals proceeded under the misapprehension that the ALJ had found the work in dispute to be historically and functionally related to traditional ILA work, and held that the Board would have committed error in finding that any of the work sought by the Rules was not historically and functionally related to traditional ILA work. Pet. App. 25a. Yet nowhere in his decision did the ALJ find that the new work of loading and unloading containers was functionally related to traditional ILA work patterns.[14]

Ignoring the detailed analysis of traditional work patterns developed by the ALJ, the court justified its holding with the simplistic observation that:

> Traditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the

14. The closest the ALJ came to such a holding was his statement that "the work in controversy herein, was performed historically at the piers by deepsea ILA longshoremen, *and elsewhere by either truckers, warehousemen, or consolidators, at inland points;*" but, he also found "[t]here is no *inseparable* integration of these tasks with other labor functions [either on or off the pier] or technology." Pet. App. 119a (emphasis added). The Board has sought to bolster the ALJ's validation of the Rules in general by purporting to "agree with the Administrative Law Judge's finding that the work of loading and unloading containers claimed by the Rules is functionally related to the traditional loading and unloading work of the longshoremen." Pet. App. 58a-59a. However, the Board did not cite any language by the ALJ finding such a "functional relationship."

> right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply changed the locus of the work, moving the operation shoreward.

Pet. App. 25a.

Thus, the court held that the Board erred as a matter of law when it concluded that, because the Rules as applied to short-stopping and traditional warehousing practices "sought to preserve for the longshoremen work that had been rendered superfluous by the change in technology and not work that had been diverted to others," the Rules violated the Act in those applications. Pet. App. 27a. The court acknowledged that containerization had not altered the motor carriers' work and had made the longshoremen's work unnecessary:

> Prior to containerization, both the longshoremen and the truckers handled the break-bulk cargo as it moved from the ship to the consignee. . . With containerization, the off-pier work of the short-stopping truckers remains essentially unchanged except that they unload cargo from containers instead of from motor trucks. And with containerization, of course, the work formerly performed by the longshoremen has been rendered unnecessary because the container can be fastened to the chassis of a truck and transported intact to the trucking terminal or freight station.

Pet. App. 27a.

Nonetheless, the court ruled that the Board's conclusion that the application of the Rules to short-stopping does not have a valid work preservation objective was erroneous for the following reason:

> [T]he Board conspicuously failed to ground this conclusion . . . in the only finding of fact that might support it: that the Rules, in preserving for ILA members the right to do this initial loading and unloading, somehow deprive the truckers and warehousemen of *their* off-pier work by transferring all or some of it to longshoremen at the pier. Put another way, the Board hung the "work acquisition" tag on the Rules in these two instances without a finding that the longshoremen acquired anything. . . [O]ne cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.

Pet. App. 27a-28a. The court asserted that "the Board made the identical error of law with regard to both short-stopping and warehousing." Pet. App. 27a n.8.

SUMMARY OF ARGUMENT

The Board correctly concluded that the Rules, as applied to short-stopping by motor carriers and to specialty warehouse work, lack a valid work preservation objective and therefore constitute unlawful secondary activity under Sections 8(b)(4)(B) and 8(e) of the Act, 29 U.S.C. §158(b)(4)(B) and 158(e).

In *ILA I*, this Court directed the Board to determine whether a historical and functional relationship exists between traditional longshore work and the work which the Rules attempt to assign to ILA members. *ILA I*, 447 U.S. at 509-10. The Court held that the Rules could be found lawful only to the extent that they preserve the essence of traditional ILA work patterns. *Id.* at 510 n.24. In directing the Board's attention to the function of traditional ILA work and the functions of the work claimed by the Rules, this Court intended the Board to analyze the purpose for which the various types of work are performed and the role of that work within the freight transportation system as a whole.

The Board properly applied the analysis mandated by this Court in finding that the short-stopping and specialty warehouse work sought by the Rules is not historically or functionally related to traditional ILA work. Substantial evidence supports the Board's findings. Undisputed evidence establishes that both before and after containerization the function of longshoremen has been to load and unload cargo of whatever size to and from ships and handle it between the ships and the trucks. In contrast, the function of short-stopping by motor carriers is to permit safer and more economical transport of cargo between the piers and inland points. Longshoremen have

never handled cargo or stripped and stuffed containers in furtherance of this motor carrier function. Similarly, the function of specialty warehouse work is to perform special packing and distribution services in connection with the storage of goods for later release pursuant to the instructions of the shipper or consignee. The facilitation of intermediate storage and surface distribution of goods has never been within the function or purpose of longshore work.

The court of appeals erroneously believed that the Board found all the work claimed by the Rules to be historically and functionally related to traditional ILA work. In fact, the Board unambiguously adopted the findings and conclusions of the ALJ, who clearly found that short-stopping and specialty warehouse work was not historically and functionally related to traditional ILA work. Although the Board purported to modify some of the ALJ's rationale, its holding that the Rules are unlawful as applied to short-stopping and specialty warehouse work is ultimately grounded upon the ALJ's findings that pre-containerization longshore work functions had never included the functions served by short-stopping and specialty warehouse work.

The court of appeals ignored the ALJ's careful analysis of the functions served by the various types of work claimed by the Rules and held that the Board was compelled to find a historical and functional relationship between traditional ILA work and all the work claimed by the Rules simply because both types of work involve the loading and unloading of cargo piece by piece. In equating a physical resemblance in job skills or duties with a historical and functional relationship between traditional longshore work and the work claimed by the Rules, the court of appeals misapplied this Court's standard. In *ILA I*, this Court recognized that both traditional ILA work and modern container work involved the loading and unloading of cargo piece by piece, but this Court rejected the argument now adopted by the court of appeals that the container is simply the hold of the ship moved shoreward.

The court of appeals further erred in holding that the Rules must be held lawful absent a finding that the Rules deprive motor carriers and warehousemen of work. In *ILA I*, this Court held that the two relevant tests of legality were first, whether the work in dispute was historically and functionally related to traditional ILA work, and second, whether the VOCCs possess the right to control the disputed work. By requiring a finding that motor carriers and warehousemen have lost work, the court of appeals has held that the Rules may claim work even though it is not historically and functionally related to traditional ILA work.

The court of appeals' reliance on its assumption that motor carriers and warehousemen have not lost work as a result of the Rules is factually as well as legally unsound. Substantial evidence establishes that motor carriers and warehousemen within 50 miles of the piers have lost and will continue to lose work due to the enforcement of the Rules, whether or not any of the disputed work returns to the piers.

Since the Board properly applied the test mandated by this Court in *ILA I*, the Board's Order as to short-stopping and specialty warehouse work should be enforced.

ARGUMENT

A. The Proper Perspective For The Work Preservation Analysis.

The Court recognized in *ILA I* that "technological innovation may *change the method* of doing the work, instead of merely shifting the same work to a different location." *ILA I*, 447 U.S. at 505 (emphasis added). The Court instructed:

> Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the *traditional work patterns* that the parties are allegedly seeking to preserve, *and of how the agreement seeks to accomplish that result* under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," . . . *including the nature of the work both before and after the innovation.*

Id. at 507 (emphasis added). The "work at issue" in this case was defined by the Board, with the court of appeals' approval, as:

> [T]he initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA.

Pet. App. 57a; 22a.

The Board was then required to measure the work in dispute against the "traditional work patterns" of the ILA, "taking into account the transformation of several interrelated industries or types of work." *ILA I*, 447 U.S. at

507. The Court's instructions did not license an award of work associated with containers which was outside of the traditional work patterns of longshoremen no matter how many jobs were eliminated by the new technology.

The uniqueness and difficulty of this case lies in the fact that the new technology has unquestionably eliminated break bulk cargo handling work by longshoremen and truckers on the piers. *ILA I*, 447 U.S. at 495. With respect to this work preservation model, the disputed break bulk handling work flows through the bargaining unit in the container pipeline and never returns in any form.[15] Just how much of the cargo handling work attendant to the new container technology should be siphoned away from the container pipeline and considered "related" to or a "part" of the traditional work function of longshoremen depends in large part on the definition of their function before containerization.

ATA believes the proper division of work functions between the transportation modes is at the historic interface where ocean borne cargo was transferred between longshoremen and truckers, because the traditional function of longshoremen has been to unload cargo of whatever size and handle it between the ships and the trucks. This Court, the ALJ, and all Respondents agreed that this was precisely the traditional function of longshoremen. *ILA I*, 447 U.S. at 510; Pet. App. 105a; Shipping Group's

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15. *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967), involved a model of work preservation where the disputed work was sent out of the unit for processing with the new technology and then brought back into the unit for further work. The court of appeals failed to recognize the difference in the *National Woodwork* model and the *ILA I* model, which led it to an improper reliance on the concept of "work acquisition" discussed in *National Woodwork*, 386 U.S. at 630-31.

Brief to the Fourth Circuit ("SGB 4 C.A.") at 6. Although the ALJ and the Board believed that the ILA was entitled to claim all of the work performed by consolidators, and much of the work performed by warehousemen and motor carriers, they found the short-stopping and specialty warehouse work to be unrelated to the traditional functions of the ILA.

The ALJ revealed the lack of any relationship between the longshoremen's traditional function and the function of the short-stopping and specialty warehouse work by considering the *purposes* for which various types of container work are performed.[16] Pet. App. 112a, 134a, 136a, 119a, 123a. Where the purpose is to avoid cargo handling by longshoremen, which but for development of the container technology might have been performed at the piers, the new container work is considered to be sufficiently related to traditional longshore work to find the Rules lawful. But, where the purpose is to serve the convenience of motor carriers and warehousemen, rather than shippers for whom VOCCs competed for business, the objective of the Rules was considered to be other than work preservation, because the function of traditional ILA work has never been to serve the convenience of truckers or traditional warehousemen.

16. *The Random House College Dictionary* (Rev. Ed. 1980) (def. 1) defines "function" as "the purpose for which something is designed or exists; role." *The Merriam-Webster Dictionary* (1974) (def. 4) defines "function" as "an action contributing to a larger action; especially, the normal contribution of a bodily part to the economy of the organism." Similarly, *Webster's Ninth New Collegiate Dictionary* (1983) (def. 2) defines "functional" as "used to contribute to the development or maintenance of a larger whole." The Supreme Court clearly used "functional" in this sense of the word when it mandated an evaluation of the historical and functional relationship between traditional ILA work and the work sought by the Rules, "taking into account the transformation of several interrelated industries or types of work." *ILA I*, 447 U.S. at 507.

This Court recognized the possibility that different functions could be served by the use of containers when it rejected "the claim that if the Rules are upheld the union would be able to follow containers around the country and assert the right to stuff and strip them far inland" by noting that "[t]hat work would bear an entirely different *relation* to traditional longshore work, and would require a wholly different analysis."[17] *Id.* at 510 n.24 (emphasis added). Thus, whether "the essence of the traditional work patterns" bears a functional relationship to the work created by the new technology depends upon the purpose of the type of container work in question. The function or purpose of the container does not remain static; its function changes as its use changes. As the ALJ said, "upon delivery of a container to a motor carrier, the seaborne leg ends, [and] the container becomes a substitute for the trailer or van."[18] Pet. App. 135a.

The court of appeals erroneously believed that the Board "divorced itself completely" from the ALJ's conclusion that short-stopping and traditional warehouse work

17. The 50-mile perimeter established by the Rules is predicated on the assumption that all pre- and post-container work performed within the zone was equivalent to ILA traditional work functions. There are no findings of fact to this effect, and there is no substantial evidence in the record that supports such a self-serving presumption.

18. "The usefulness of a container lies precisely in the fact that it may function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as part of a railroad car when it is carried by rail." *ILA I*, 447 U.S. 510 n.23. "Merit exists in the observation by counsel for ATA-TMTA that containerization produced an equipment change which is 'chameleon-like' as it passes through various segments of the transport industry. . . . Thus, when one considers traditional business practices in the surface transportation industry, it seems only logical that the container, as it passes from marine stage of the journey into the hands of traditional surface conveyance, be treated as the equivalent of the trailer or truckload." Pet. App. 135a n.51.

bore no functional relationship to traditional ILA work. Pet. App. 22a. However, the court of appeals overstated the Board's disagreement with the ALJ's rationale. The only reservation the Board had with the ALJ's rationale was with his emphasis on the fact that short-stopping and traditional warehouse work was not diverted to motor carriers and warehousemen by the container technology. Pet. App. 59a. The Board agreed with the ALJ's conclusion that the purpose of this work was to benefit the off-pier employers rather than their customers. Pet. App. 42a. The Board cited *Carrier Air Conditioning Co. v. NLRB*, 547 F.2d 1178 (2d Cir. 1976), *cert. denied*, 431 U.S. 974 (1977), and *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975), "where the creation of a new product entirely eliminated the work which the bargaining unit employees were seeking to preserve in the agreements found to be unlawful," merely as other examples wherein traditional work had been completely eliminated and integrated into a different work function. Pet. App. 59a-60a.

The difference in emphasis between the rationales of the Board and the ALJ is insignificant. Of far greater importance is the fact that the Board did not take issue with or qualify the ALJ's finding that "historically, the unloading and reloading work done by the truckers at local terminals was not done on behalf of shippers, but rather was done for reasons related to surface transportation, such as to combine several smaller truckloads into one larger truckload for delivery to the same geographic destination." Pet. App. 54a. Nor did it disturb the ALJ's finding that

> [S]ome of the short-term and long-term warehousing work claimed under this rule had *never been performed by ILA-represented employees* at the pier, but rather had traditionally been performed only by employees at inland public warehouses, such as the ongoing storage of a manufacturer's goods for distribution on short notice to customers based on future orders and the ongoing storage of a company's purchased inventory for distribution on short notice to its foreign facilities as demand required.

Pet. App. 56a (emphasis added). Thus, the Board's holding is ultimately grounded upon the ALJ's findings that pre-containerization longshore work functions had never included the functions served by specialty warehouse work and by short-stopping for motor carrier convenience.

B. The ALJ's Findings As To Short-Stopping And Specialty Warehouse Work Are Supported By Substantial Evidence.

The Board's findings should be sustained on appeal if they are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); National Labor Relations Act, Sections 10(e) and 10(f), 29 U.S.C. §160(e), (f).

The brief filed by Respondents with the court of appeals admitted that "the relevant facts are essentially undisputed . . . ALJ thus had no difficulty reaching his findings of fact which were adopted without reservation of the Board." SGB 4 C.A. at 4-5. The maritime group Respondents did not contend in the court of appeals that the ALJ's decision as to short-stopping and specialty warehouse work was not supported by substantial evidence. Instead, they argued that "Judge Harmatz, misapplying the legal principles enunciated in *ILA*, found that the Rules, although lawful on their face, constituted a secondary

work acquisition device when applied to certain trucking and warehousing practices." SGB 4 C.A. at 20. Therefore, assuming that the Board applied the proper legal analysis, the ALJ's conclusions that the Rules may not be enforced as to short-stopping and specialty warehouse work must be upheld because they are supported by substantial evidence on the record as discussed below.

1. Short-stopping by motor carriers

Motor carriers short-stop containers for their own benefit and convenience in the performance of their function as motor carriers. The function of local motor carriers is to pick up and deliver freight in the seaport areas either on behalf of beneficial owners located there or to transport it between the piers and motor carrier freight stations where it can be sorted and loaded onto over-the-road truck trailers for delivery to one or more inland points. Pet App. 132a; Jt. App. 6-7, 25-26, 90-93, 113-115, 127-128, 205-206, 228-230. Before containerization, this cargo usually had to be exchanged between a local cargo truck and an over-the-road truck because of different equipment and different classes of drivers who operate these trucks. Jt. App. 8-9, 14-15, 21, 25-26, 89-90, 112, 128, 130-131.

Motor carriers decide to short-stop containers for the same reasons that previously prompted them to transfer truckloads of break bulk cargo into over-the-road truck trailers. Like trailer loads of break bulk cargo picked up from the pier in the pre-container era, full containers may exceed state highway limitations or be overloaded, unbalanced or otherwise unsuitable for hauling long distances. Jt. App. 9-10, 115-116, 117-118, 129-130, 201, 206-207, 208-210, 212-213, 218, 222, 229-230. Motor carriers may also short-stop containers for economic considerations

related solely to their own operations. It is more economical for motor carriers to load the contents of two or more containers into one 45-foot truck trailer than to haul two containers long distances. Motor carriers avoid maintenance costs and per diem charges on containers by transferring the cargo onto their own trailers. They also avoid the cost of returning the empty containers from a long-haul delivery, because a road trailer can be sent on to some other inland point. Jt. App. 6-7, 9-10, 27-28, 69-70, 92, 98-99, 117-118, 129-131, 207-209, 212, 216-217, 222, 225-226, 229-230. To achieve these goals container stripping and stuffing is performed at the motor carrier's discretion and at his own expense. Jt. App. 91, 113, 117-118, 131. Neither VOCCs nor longshoremen have ever handled cargo or stripped and stuffed containers in furtherance of these motor carrier operating functions.[19]

2. Specialty warehouse work

Many warehouses offer local trucking services. Jt. App. 12-23, 43-62, 94-102. Unlike "pure" motor carriers, however, warehouses have storage capacity. Customers have always had discretion to time the release of cargo from storage whether within or beyond the first 30 days of storage.[20] Like motor carriers, warehousemen

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19. Intermodalism permits shippers and consignees to dictate where and under what conditions containers will be stripped and stuffed. Pure intermodalism cannot always be accomplished. When containers are stripped and reloaded into truck trailers due to motor carrier considerations, the intermodal function of the container has worked to the limit of the advancement of the technology.

20. If a warehousing account is opened, there is a minimum 30 days storage charge regardless of how long the cargo is warehoused. Pet. App. 141a. Until the 1974 edition of the Rules the ILA exempted from the Rules the stripping and stuffing of containers with cargo "discharged at a bona fide public ware-

(Continued on following page)

have always performed unloading, sorting and consolidation work, sometimes at customer discretion, sometimes for their own convenience. Jt. App. 97-98, 101.

Although warehousemen do compete with seaport terminal companies regarding the function of preparing cargo for further sea, road and rail transportation and short-term storage, there are certain specialty warehouse functions which never have been performed by seaport terminal companies. The affidavits of Matthew Mahon, Jr., President of Mahon's Express, a trucker/warehouseman, cogently describe the functions of his company from its formation in 1905 through the attempted enforcement of the Rules in January 1981. Jt. App. 43-62. The ALJ recognized that Mahon's services on behalf of F.W. Woolworth Company, S.S. Kresge Company and other retail chains served transportation and distribution functions never historically within the function of ILA represented employees or their employers. Pet. App. 144a n.58. The ALJ reached the same conclusion with respect to the operations of Wilson Container Co., Inc. Pet. App. 144a n.58, 126a n.46. Other examples include similar operations by trucker/warehousemen Marty's Express Inc. and D. D. Jones Transfer and Warehouse Co., Inc. Jones, Marty's and Mahon actually break down cases of cargo, which have been re-

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Footnote continued—

house" in connection with a warehouse account which called for the payment of "normal warehouse storage fees for a minimum period of 30 or more days." Pet. App. 225a-226a. However, beginning with the 1975 edition of the Rules the ILA engrafted upon normal warehousing practice the additional and unnatural condition that the warehouseman "store[s] the cargo for a minimum period of 30 days" as proof of "bona fide public warehouse" work. Pet. App. 232a. The undisputed facts are that a substantial proportion of warehoused cargo historically was forwarded within the 30 day period, even though some of the cargo may be stored for indefinite periods of time, and that requiring storage for 30 days "is often incompatible with the consignee's need to meet customer demand." Pet. App. 138a, 141a; Jt. App. 15, 96, 135.

moved from containers, and deliver to retail outlets individual pieces of merchandise, either immediately or after some indefinite period of storage, upon instructions of their customers. Jt. App. 43-44, 68-69, 71, 96-97.

The advent of modern containers brought no change in these historic warehouse transportation functions. The physical work consisting of loading, unloading, sorting and consolidating cargo and the purpose of this work remained the same; only a change of equipment occurred —the size of the cargo container increased. Jt. App. 53-55, 83-87, 98-99, 134-135. There is simply no evidence that the functions served by short-stopping and specialty warehousing were ever part of traditional longshore functions.

C. The Court Of Appeals Erred In Equating A Physical Resemblance In Job Skills Or Duties With A Historical And Functional Relationship Between Traditional ILA Work And The Work Claimed By The Rules.

After erroneously asserting that the Board had found all of the work sought by the Rules to be historically and functionally related to traditional ILA work, the court of appeals compounded its error by asserting that the Board "could not have concluded otherwise." Pet. App. 25a. The court defended this startling assertion with the observation:

> Traditionally, longshoremen loaded cargo piece by piece into the hold of the ship and unloaded it piece by piece from the hold. The Rules grant them the right in certain instances to load cargo piece by piece into containers and unload it piece by piece from containers. In short, containerization has simply

changed the locus of the work, moving the operation shoreward.

Pet. App. 25a. The court obviously considered a historical and functional relationship between traditional ILA work and the work sought by the Rules to be established merely by virtue of the fact that both types of work require similar job skills or duties, i.e., the loading of cargo "piece by piece." Pet. App. 25a.

The court of appeals' application of the historical and functional relationship test is clearly at odds with this Court's decision in *ILA I*. This Court fully recognized in *ILA I* that "the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers." *ILA I*, 447 U.S. at 508. If this Court had shared the view of the court of appeals that this similarity in work duties established a historical and functional relationship between traditional ILA work and all of the work sought by the Rules, there would have been no need for this Court to remand the case to the Board.[21]

In *ILA I*, this Court cautioned that "the analysis is not, as the parties have sometimes seemed to suggest, simply a matter of deciding whether a container is more like the hold of a ship or more like a big box." *ILA I*, 447 U.S. at 509 n.23. The analysis of the court of appeals is guilty of precisely the error identified by this Court by simplistically equating the container with the hold of the ship moved shoreward. Pet. App. 25a.

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21. The holdings of such cases as *Meat and Highway Drivers Local 710 v. NLRB*, 335 F.2d 709 (D.C. Cir. 1964), which upheld the lawfulness of a work allocation clause seeking admittedly "non-traditional work" on the ground that the work claimed "is of a type which the men in the bargaining unit have the skills and the experience to do," clearly have been overruled by this Court's adoption in *ILA I* of the historical and functional relationship standard.

The court of appeals failed to recognize that the application of the historical and functional relationship standard requires an examination of the *purpose* of traditional ILA work and modern container work and a comparison of their respective roles in the freight transportation system as a whole. The court declined to undertake this analysis and ignored the thorough findings of the ALJ, who carefully compared the purpose and function of traditional ILA work to each category of work sought by the Rules. The court of appeals' sweeping and summary analysis ignores this Court's caution that "the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns." *ILA I*, 447 U.S. at 510 n.24. This Court thereby recognized that some of the work sought by the Rules might be historically and functionally related to traditional ILA work while other categories of work might not be, even though all the work sought by the Rules involved the loading of cargo piece by piece into containers. *Id.*

In *ILA I*, this Court recognized that distance as well as purpose could affect the definition of function by noting that if the ILA attempted to follow containers around the country and "assert the right to stuff and strip them far inland," the work claimed by the ILA "would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis." *ILA I*, 447 U.S. at 510 n.24. The rationale of the court of appeals, however, would subsume even this situation. No matter how far inland the containers were moved, it would still be true that some employee would be stuffing and stripping the container "piece by piece," and therefore, according to the court of appeals, the Board "could not conclude otherwise" than to hold that the container work was

historically and functionally related to traditional ILA work. This result is clearly contrary to *ILA I*.

The Board, unlike the court of appeals, recognized even before *ILA I* that the maximum utilization of skills is not the watchword for a work preservation analysis. In *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673 (1972), Local 282 members traditionally performed inter-construction site driving and delivered supplies to project sites from local suppliers. Changes in the construction industry, however, eliminated many local suppliers and contractors began receiving prefabricated material shipped by out-of-state suppliers directly to the contractors' projects. Direct shipment of supplies eliminated the need for some of Local 282's traditional delivery work. The union responded by negotiating an agreement requiring contractors to assign to Local 282 members alone the work of driving trucks to, from or on construction sites. The Board found that Local 282's members had not traditionally done all the work sought by the agreement, and concluded that a mere physical similarity between Local 282 members' traditional work and the driving work sought by the agreement could not establish a work preservation objective:

> [T]he driving work which the unit employees here perform is considerably more limited than that which they seek to preserve. The fact that the driving of one truck may well be similar to, and require like skills as, the driving of any other truck does not persuade us that all driving work is therefore "fairly claimable" by a unit of drivers.

197 NLRB at 678. As in *Fortunato*, the fact that traditional longshore work bears a physical resemblance to the work sought by the Rules does not establish that the Rules have a lawful work preservation objective. *Accord, Plumbers and Steamfitters Local Union 342 (Conduit Fabricators, Inc.)*, 225 NLRB 1364 (1976), *remanded*, 598 F.2d 216 (D.C. Cir. 1979); *supplemental opinion*, 251 NLRB 794 (1980); *Sheet Metal Workers Union, Local 162 (Associated Pipe and Fittings Mfrs.)*, 207 NLRB 741 (1973).

D. The Court Of Appeals Erred In Holding That The Rules Must Be Held Lawful Absent A Finding That The Rules Deprive Motor Carriers And Warehouses Of Work.

The court of appeals held that the Rules cannot be unlawful in any respect absent a finding that they deprive off-pier motor carriers and warehouses of work. Pet. App. 27a-28a. Disagreeing with the Board's conclusion that loading and unloading FSL containers by motor carriers and warehousemen was work beyond the lawful reach of the Rules, the court of appeals stated:

> Prior to containerization, truckers and warehousemen handled the cargo break-bulk; unloading of the cargo from the hold of the ship by the longshoremen obviously did not hinder these off-pier practices. Thus, one cannot possibly maintain that the stripping of import containers at the pier would in any way prevent the identical off-pier work. To repeat, truckers and warehousemen do precisely what they did before the change in technology; the longshoremen have acquired none of that work. Although the longshoremen's work in this process may well duplicate the off-pier work of truckers and warehousemen, calling this set of circumstances "work acquisition" strikes us as particularly inappropriate.

Pet. App. 28a.

In so holding the court of appeals misapplied the mandate of *ILA I*. There this Court emphasized that §8(b)(4)(B) prohibits "activities whose object is to force one employer to cease doing business with another," and that §8(e) prohibits "bargaining agreements in which the employer agrees to cease doing business with any other person." *ILA I*, 447 U.S. at 503-504. In no way did the Court suggest that the outcome of the case depended upon the *effect* of the Rules on the off-pier businesses or whether they lost work to the piers. To the contrary, the Court made it clear that the impact of the Rules on the work opportunities of off-pier businesses was "irrelevant to the validity of the agreement." *ILA I*, 447 U.S. at 507 n.22. The Court clearly held that the two relevant tests of legality were first, whether the work in dispute was historically and functionally related to traditional ILA work, and second, whether the VOCCs possess the right to control the disputed work. *ILA I*, 447 U.S. at 504. Thus, the Board's finding that the motor carrier and warehouse work sought by the Rules was not historically and functionally related to traditional ILA work is of itself sufficient to establish the unlawfulness of this aspect of the Rules. No additional finding that motor carriers and warehouses lost work is necessary.

The court of appeals placed undue emphasis on the concept of "work acquisition." This term has been used to help define an unlawful secondary objective, as in *National Woodwork*, 386 U.S. at 630-31, but it has never been adopted by the Board or the courts as an independent legal test of compliance with §8(b)(4) until adopted below by the court of appeals. Clearly, this Court, in *ILA I*, was well aware that the Rules sought to claim for ILA labor "the utterly useless task of removing the contents and then repacking them . . . [which] is nothing

less than an invidious form of 'featherbedding' to block full implementation of modern technological progress." *ILA I*, 447 U.S. at 526-527 (dissenting opinion). If the Court had felt that this duplication of container work on the pier and at the motor carrier's freight station prevented the Rules from having a secondary objective, there would have been no need to remand the case.

The proscribed secondary objective is established, in the language in the Act, by the pressure the ILA placed on the steamship lines to force them "to cease doing business with any other person," including motor carriers and warehouses. Work preservation is permitted only where the union's conduct is not "tactically calculated to satisfy [its] objectives elsewhere," whether or not those objectives are to deprive the employer with whom the real dispute exists of its work. *National Woodwork*, 386 U.S. at 644; *NLRB v. Enterprise Assn. of Steam Pipefitters, Local No. 638*, 429 U.S. 507, 528 (1977). Furthermore, this Court has held that the object of a union's activity does not have to be a complete cessation of business; a violation occurs when a union coerces the neutral employer to merely change its method of doing business with the targeted employer. *NLRB v. Local 825, Operating Engineers*, 400 U.S. 297, 304 (1971). Since the enforcement of the Rules requires the steamship lines to cease doing business with motor carriers and warehouses by denying them access to containers, it is unnecessary and contrary to the decisions of this Court to examine the impact of such enforcement on the work of motor carriers and warehouses.

Assuming, *arguendo*, that the loss of work by motor carriers and warehouses is relevant to the lawfulness of the Rules, the court of appeals' assumption that no loss of work would occur is factually unsupportable. Motor car-

riers and warehouses within 50 miles of the pier would certainly lose a significant volume of work if the Rules were enforced. By eliminating break bulk handling at the pier, containerization allowed the shipment of types of commodities which could not previously be shipped due to special handling requirements or an excessive risk of loss or damage. Jt. App. 99. This work would be lost if the container could no longer be used as it presently functions. Other work would be lost because the added cost of duplicate handling at the pier would cause certain shipping patterns to be unprofitable; container work would simply be moved outside the fifty-mile zones.[22] Jt. App. 59-60, 93, 101, 115-116, 125, 131-132, 136-137. If this were not so, the Rules would not contain a provision addressed to the avoidance of the Rules by movement of consolidation operations beyond the 50-mile perimeter. Pet. App. 228a.

Thus, the true and undisputed facts are that many motor carriers and warehousemen operating within the 50-mile zones will be financially devastated by the enforcement of the Rules because there will be no duplication of work opportunities. The work will be altogether lost by motor carriers and warehouses within the 50-mile zones.[23] These undisputed facts support the ALJ's finding that "application of the Rules [with respect to short-stopping and specialty warehousing] is viewed as an attempt to offset job losses on the piers by disrupting inland work patterns." Pet. App. 137a. The clear goal of the

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22. The contention of the Respondents, that "[t]he change in business practices which would constitute the 'cessation of business' element of the Board's trucking and warehouse rulings in this case is minimal," is preposterous. Shipping Group Brief in opposition to Petition for Certiorari, Addendum at 9 n.8.

23. Motor carriers and warehousemen are not fungible entities. The fact that a motor carrier or warehouseman outside the 50-mile zone may handle the break-bulk cargo is no consolation to those within the zone who have lost work.

Rules is to prevent motor carriers and warehousemen from performing container work in the hope that customers will transfer that work to the piers rather than beyond the 50-mile perimeter. Such an object is proscribed by Sections 8(b)(4)(B) and 8(e).

CONCLUSION

The judgment of the court of appeals should be reversed and the Decision and Order of the Board should be enforced. Substantial evidence supports the ALJ's findings, adopted by the Board, that short-stopping and specialty warehouse work is not functionally related to traditional ILA work. Therefore, the attempt to interdict this work for the benefit of longshoremen by the enforcement of the Rules violates the secondary boycott provisions of the Act, irrespective of the amount of work lost or the economic impact of the enforcement of the Rules on the off-pier transportation functions.

Respectfully submitted,

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